

U.S. Department of  
Homeland Security

**United States  
Coast Guard**



Director  
United States Coast Guard  
National Pollution Funds Center

NPFC CA MS 7100  
US COAST GUARD  
4200 Wilson Blvd. Suite 1000  
Arlington, VA 20598-7100  
Staff Symbol: (CA)  
Phone: 800-280-7118  
E-mail: [REDACTED]  
Fax: 703-872-6113

5890  
03/06/2014

VIA EMAIL: [REDACTED]

City of Battle Creek  
ATTN: Rick Hensley – Risk Manager  
10 Division North, Room 217  
Battle Creek, MI 49015

Re: Claim Number 913030-0001

Dear Mr. Hensley:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, offers payment on claim number 913030-0001 in the amount of \$135,180.69. Please see the attached Claim Summary / Determination Form for the rationale regarding this determination.

Mr. Germain Macias was found guilty by the State of Michigan, 37<sup>th</sup> Circuit Court, and ordered to pay restitution in the amount of \$149,586.97. When the Claimant receives a restitution payment through the Courts, such payment must be forwarded to the NPFC for reimbursement to the Fund until payment in full for this claim as adjudicated by NPFC is satisfied, in the total approved amount of \$135,180.69.

If you accept this determination, please sign the enclosed Acceptance/Release Form where indicated and return to the above address.

If we do not receive the signed original Acceptance/Release Form within 60 days of the date of this letter, the determination is void. If the determination is accepted, an original signature and a valid tax identification number (EIN or SSN) are required for payment. If you are a Claimant that has submitted other claims to the National Pollution Funds Center, you are required to have a valid System for Award Management Registration (SAM) record prior to payment. If you do not, you may register free of charge at [www.sam.gov](http://www.sam.gov). Your payment will be mailed or electronically deposited in your account within 60 days of receipt of the Release Form.

Sincerely,

[REDACTED]

Claims Manager

ENCL: Claim Summary / Determination Form  
Summary Spreadsheet of Costs

## CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 913030-0001
Claimant	: City of Battle Creek, Michigan
Type of Claimant	: Local Government
Type of Claim	: Removal Costs
Claim Manager	: Cynthia E Oliver
Amount Requested	: \$149,586.97

### FACTS:

**Oil Spill Incident:** On January 31, 2012, the Michigan Department of Environmental Quality (MDEQ) was notified of a discharge of oil into the waters of the Kalamazoo River, a navigable waterway of the United States, near Territorial Road and Riverside Road.<sup>1</sup> The oil spill originated oil from a home heating oil tank located at [REDACTED]. Mr. Fernando Hernandez, owner of the home, wanted the tank removed from the residence. Mr. Germain Macias, the homeowner's nephew, wanted to sell the tank for scrap metal. Upon removal of the tank from the home, Mr. Macias and his minor son, poured the home heating oil from the tank into the storm sewer proximal to the residence and then sold the tank for scrap at a local metal recycler.<sup>3</sup>

MDEQ was notified of the spill, and Mr. Ken Leanin of MDEQ Water Resources responded to the site of discharge. Mr. Leanin engaged Michael Andrews, employee of the city of Battle Creek, in locating the origin of the spill. The path of the spill from the outfall into the Kalamazoo River was traced back to [REDACTED] using sewer system maps and systematic examination of manholes along the route. It was determined that approximately 80 gallons of home heating oil was poured into the storm sewer proximal to [REDACTED] which flowed through the drainage system where it exited an outfall located near Territorial Road and Riverside Road and entered the Kalamazoo River, a navigable waterway of the United States.

**Responsible Party:** Mr. Fernando Hernandez owned the property located at [REDACTED]. He was the owner of the home heating oil tank, the source of the oil discharge in this incident, and is a Responsible Party (RP) under the Oil Pollution Act (OPA).

**The Claim and the Claimant:** The City of Battle Creek presented a removal cost claim to the National Pollution Funds Center (NPFC) in the amount of \$149,586.97 for their uncompensated removal costs incurred for this incident. The Claimant presented its costs to Mr. Germain Reyes Macias on March 5, 2013 via certified mail as a Responsible Party for the cleanup actions associated with this incident. The Claimant has received no compensation from Mr. Macias as of the date of this Determination by the NPFC.

The claim consists of the OSLTF Claim Form, MDNR Investigation Report and associated documents, city map demonstrating route of oil through sewer system, MDEQ laboratory oil testing results, State of Michigan Judgment of Sentence for Mr. Macias, invoice summary sheet, contractor invoicing, contractor proof of payment, contractor rate schedule, on scene photographs of the response actions, and copies of disposal manifests.

<sup>1</sup> See, Michigan Department of Natural Resources Environmental Investigation Report, dated February 9, 2012.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> See, City of Battle Creek property records printout provided by Claimant dated July 10, 2013

**Description of Removal Actions:** The City of Battle Creek Fire Department HazMat Team initially responded and placed sorbent pads along the area of the spill at the outfall site. The incident was reported to the National Response Center (NRC) and assigned report number 1001939. The City of Battle Creek contracted with SWAT Consulting for oil spill cleanup.<sup>5</sup> The contractor placed containment boom, applied sorbent pads, and disposed of spent sorbents.<sup>6</sup> An unquantifiable but significant amount of fuel was removed from the waterway.

#### **APPLICABLE LAW:**

Under OPA 90, at 33 USC § 2702(a), each responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of a discharge of oil, into or upon the navigable waters is liable for removal costs and damages resulting from such incident. 33 U.S.C. § 2702(a).

Removal costs are defined as “the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from an incident”. 33 U.S.C. § 2701(31).

“Removal costs” are any removal costs incurred by any person for acts taken by that person which are consistent with the National Contingency Plan.” 33 USC § 2702(b)(1)(B).

“Facility” means “any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil.” 33 U.S.C. § 2701(9).

A responsible party for an onshore facility is any person owning or operating the facility. 33 U.S.C. § 2701(32)(B).

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean “oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil”.

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages.

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, “a claimant must establish -

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

- (c) That the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC.”

Under 33 CFR 136.205 “the amount of compensation allowable is the total of uncompensated *reasonable* removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOSC.” [Emphasis added].

## **DETERMINATION OF LOSS:**

### ***Overview:***

1. FOSC coordination was made by USEPA OSC Brian Kelly, via USEPA POLREP #1; 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4);
2. The incident involved the discharge of “oil” as defined in OPA 90, 33 U.S.C. §2701 to “navigable waters;”
3. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs;
4. The claim was submitted within the six year period of limitations for claims. 33 U.S.C. § 2712(h)(1);
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the payable and reimbursable removal costs to be offered to the claimant are for actions in accordance with the NCP and that the costs for these actions were reasonable and allowable under OPA and 33 CFR § 136.205.

### ***Analysis:***

#### Presentment

In this case both the owner of the home heating oil tank, Fernanco Hernandez, and Germain Reyes Macias, who intentionally dumped the contents of the home heating oil tank into the storm sewer, are liable for the incident. On September 20, 2013, the NPFC contacted the Claimant via email requesting evidence of presentation of removal costs incurred for the home heating oil spill to the owner of the tank, Mr. Fernando Hernandez and Plassman Properties, LLC. Claimant indicated that it presented the removal costs to the responsible parties but the NPFC did not receive evidence of such presentment.

The Claimant provided evidence to the NPFC that Mr. Germain Macias, nephew to Mr. Fernando Hernandez, pled guilty to a felony charge of Water Resources Protection Violations for the intentional discharge of oil into the Kalamazoo River by emptying the contents of the heating oil tank into the storm sewer which led to the Kalamazoo River, a navigable waterway. Mr. Macias’ guilty plea was filed on August 30, 2012 and on October 18, 2012, the Judge issued Judgment against Mr. Macias for restitution to the City of Battle Creek in the amount of \$149,586.97, among other costs.

The NPFC issued an RP Notification Letter to both Mr. Germain Macias on February 19, 2013 and to Mr. Fernando Hernandez as owner of the home heating oil tank on July 10, 2013. No response was received from either responsible party within 90 days of presentment.

#### Removal Cost Analysis

NPFC CA reviewed the actual cost invoices and dailies to confirm that the claimant had incurred all costs claimed. The review focused on: (1) whether the actions taken were compensable “removal actions” under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the

actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

Upon review of the claim submission, the NPFC has determined that some of the removal costs presented and incurred were billed inappropriately at the time services were rendered.

SWAT Consulting invoice dated February 13, 2012 indicates,

"As this was Enbridge's boom, they have requested that the boom be replaced. The [price] reflects replacement costs. Would recommend that the city decon the boom and keep for future releases."

Contractor rate schedule shows containment boom is billed at a cost of \$1.75/foot/day. Using this calculation figure, 625' of boom at \$1.75/ft equals \$1093.75. Replacement costs billed by the contractor are at a rate of \$11.00/ft for 625' of creek boom, which equals \$6,875.00. Replacement costs billed by the contractor for 500' of river boom are at a rate of \$1.75/ft, which equals \$9,500.00. The contractor's use of another party's boom for this response is a business decision; however, the Fund is not available to pay replacement costs exceeding the contractor's standard rate for boom deployment. The replacement cost for the booms used less the standard rate for booms used totaling \$14,406.25 is denied.

Several rounding errors also exist in the invoice documentation, rendering the sum certain of \$149,586.97 overstated by \$0.03. The \$0.03 difference due to rounding errors is denied.

***Determined Amount:***

The NPFC hereby determines that it will offer to pay \$135,180.69 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 913030-0001.

Please note that the October 18, 2013 Order by the State of Michigan, 37<sup>th</sup> Judicial Circuit, Calhoun County, provided that restitution in the amount of \$149,586.97 shall be paid to the City of Battle Creek. Any and all part of the restitution received by the City of Battle Creek shall be returned to the Fund.

**AMOUNT: \$135,180.69**

Claim Supervisor:

Date of Supervisor's review: 3/6/14

Supervisor Action: *Approved*

Supervisor's Comments:

U.S. Department of  
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**United States  
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Director  
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Fax: 703-872-6113

Claim Number: 913030-0001	Claimant Name: City of Battle Creek ATTN: Rick Hensley – Risk Manager 10 Division North, Room 217 Battle Creek, MI 49015
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I, the undersigned, ACCEPT this settlement offer of \$135,180.69 as full and final compensation for the removal costs arising from the specific claim number identified above.

This settlement represents full and final release and satisfaction of the amounts paid from the Oil Spill Liability Trust Fund under the Oil Pollution Act of 1990 for this claim. I hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action, that I may have against any party, person, firm or corporation that may be liable for the amounts paid for which I have been compensated under this claim. I authorize the United States to sue, compromise or settle in my name and the United States fully substituted for me and subrogated to all of my rights arising from and associated with those amounts paid for which I am compensated for with this settlement offer. I warrant that no legal action has been brought regarding this matter and no settlement has been or will be made by me or any person on my behalf with any other party for amounts paid which is the subject of this claim against the Oil Spill Liability Trust Fund (Fund).

This settlement is not an admission of liability by any party.

I, the undersigned, agree that, upon acceptance of any compensation from the Fund, I will cooperate fully with the United States in any claim and/or action by the United States against any person or party to recover the compensation. The cooperation shall include, but is not limited to, **immediately reimbursing the Fund for any compensation received from any other source for those amounts paid for which the Fund has provided compensation**, and by providing any documentation, evidence, testimony, and other support, as may be necessary for the United States to recover from any other person or party.

I, the undersigned, certify that to the best of my knowledge and belief the information contained in this claim represents all material facts and is true. I understand that misrepresentation of facts is subject to prosecution under federal law (including, but not limited to 18 U.S.C. §§ 287 and 1001).

_____ Title of Person Signing	_____ Date of Signature
_____ Typed or Printed Name of Claimant or Name of Authorized Representative	_____ Signature

_____ Title of Witness	_____ Date of Signature
_____ Typed or Printed Name of Witness	_____ Signature

_____ TIN Required for Payment	_____ Bank Routing Number	_____ Bank Account Number
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